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SUPREME COURT OF THE UNITED STATES

WOODROW W. RUNYON, SR., - - *Petitioner,*

v.

COMMONWEALTH OF KENTUCKY, - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

The petitioner, Woodrow W. Runyon, Sr., prays that a Writ of Certiorari issue to review the decision of the Court of Appeals of Kentucky in this case.

OPINION BELOW.

On February 26, 1965, the Court of Appeals of Kentucky announced the decision sought to be reviewed and its opinion is published in 393 S. W. 2d 877. It is appended (Appendix A, p. 17).

JURISDICTION.

On December 9, 1963, by judgment entered that day, the petitioner was adjudged in the Pike Circuit Court, the 35th Judicial District of the Commonwealth of Kentucky, to be guilty under an indictment charging that he obtained $452.25 by submitting a false and

fraudulent claim to the Pike County Board of Education.

The opinion of the appellate court sustaining his conviction was not given out for publication until October 1, 1965, when his Petition for Rehearing was overruled by the Kentucky Court of Appeals.

On December 29, 1965, the Court of Appeals of Kentucky, without opposition from the Attorney General of the State, and without opposition from the Commonwealth's Attorney of the 35th Judicial District, sustained petitioner's motion for stay of enforcement of the mandate to Saturday, February 26, 1966.

On December 30, 1965, Justice Potter Stewart granted an order extending to, and including, Saturday, February 26, 1966, the time to file this petition.

Petitioner claims jurisdiction to grant certiorari is conferred by 28 USC 1257 (3).

QUESTIONS PRESENTED.

1.

The question is whether the Commonwealth of Kentucky, over petitioner's plea of former jeopardy under the Constitution of the United States and after he had been tried and acquitted on a charge of embezzling $18,178.01 from his employer, the Pike County Board of Education, could then be tried on thirty-three indictments charging that he obtained different parts of the total sum by submitting false claims to the Board of Education.

2.

The further question is whether the petitioner, who demanded trial on all thirty-three indictments when they were first docketed in June of 1963, and was refused by the Commonwealth; who demanded trial on all thirty-three in November of 1963 and was refused, except as to one; who has been compelled to defend—albeit successfully—after change of venue to another county, a third series of thirty-two indictments charging him, and others, with "misapplication" of the same funds; who after more than three years in court still has thirty-two cases pending against him to be tried when the Commonwealth may choose, has been denied the prompt trial, equal protection of the laws and due process guaranteed by the United States Constitution to its citizens.

CONSTITUTIONAL PROVISIONS.

The United States Constitution, Amendment 5.

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The United States Constitution, Amendment 6.

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defense."

The United States Constitution, Amendment 14, Section 1.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE.

Woodrow W. Runyon, Sr., the petitioner here, a long time Bus Supervisor and on occasion Paymaster in transportation matters for the Board of Education of Pike County, Kentucky, was indicted on January 9, 1963, charged with the embezzlement of $18,178.01 (TR, page 21). He appeared at that time and the case

was passed to the next term. It was again assigned for trial on March 14, 1963. Petitioner appeared, but the case was passed over to the next term. It was again called for trial on June 17, 1963, and the petitioner appeared for the third time answering ready for trial (TR, page 27).

The Commonwealth appeared with a motion to dismiss or file away the indictment set for trial. In Kentucky a criminal case "filed away" is subject to redocketing at the will of the prosecution.

Your petitioner, the defendant there, insisted on trial.

The Commonwealth refused to try any case, but indicated that one of thirty-three new indictments might be tried after a certain period of time.

The defendant insisted that Indictment No. 33, the embezzlement charge which was set for trial, be tried or else the whole number of new indictments charging the taking of the same total sum be tried together. Over the objection of the Commonwealth, the Court sustained the defendant's contention and compelled the Commonwealth to try the embezzlement charge. This unusual transaction is set forth at length in the record before this Court (TR, pages 22-46).

The Commonwealth refused to enter any evidence and the jury returned a verdict of not guilty. (Appendix B, p. 25).

On November 14, 1963, the new series of thirty-three indictments came on for trial. The Commonwealth indicated a willingness to try one, Indictment No. 129, and to continue the rest.

The defendant objected and demanded trial on all thirty-three indictments.

He was overruled. Trial on the one resulted in a conviction under Indictment No. 129, for obtaining $452.25, from the Pike County Board of Education by means of a false claim.

That is the only trial he has been able to get.

On June 3, 1964, another series of thirty-two indictments was returned by the Pike County Grand Jury against petitioner, jointly with the County School Superintendent and the Assistant Superintendent, charging misapplication of state funds. These were numbered consecutively from 503 to 534. Indictment 503 is appended as a specimen (Appendix C, p. 27).

On the motion of the other defendants—not petitioner—this series was transferred to Floyd County Kentucky (Appendix D, p. 30). Followed a year of motions and hearings. On May 27, 1965, all thirty-two were dismissed (Appendix E, p. 32).

After more than three years in court, sixty-six indictments, motions, hearings and assignments galore, petitioner is still subject to trial thirty-two times.

CONSTITUTIONAL RIGHTS IN THE TRIAL COURT.

On November 14, 1963, petitioner filed his written motion to dismiss Indictment No. 129, and ground Number 4 is quoted as follows:

> "The prosecution of the charge stated in this indictment would deprive defendant of rights

guaranteed to him by the Constitution of the United States of America, Amendment 5, Amendment 6 and Amendment 7" (TR, page 13).

On November 18, 1963, the day before trial, the petitioner filed his second written motion to dismiss, captioned in each one of the thirty-three indictments, which bore numbers consecutively from 104 to 136, and the second paragraph stated the following ground:

"The prosecution of this defendant in 33 separate, several and distinct indictments, after defendant had been indicted, tried and acquitted in one cause, which embraced all the criminal acts charged in each and in all of the above captioned indictments, constitutes a wrongful, multiplication and splitting of the charge against defendant and denies to defendant, a citizen of the United States of America and of the Commonwealth of Kentucky, the prompt trial guaranteed to defendant by the Constitution of the United States of America, Amendment 5 and Amendment 6, and the Constitution of the Commonwealth of Kentucky, Section 11" (TR, pages 53-54).

Ruling of the Trial Court.

The action on one of petitioner's constitutional questions is shown in the trial order for November 19, 1963, where it is stated:

"The defendant present with counsel, insisted upon his motion to dismiss the indictment upon a plea of former jeopardy, and the Court being suf-

ficiently advised, overruled said motion to dismiss, to which ruling of the Court, the defendant excepts" (TR, page 55).

After filing written motion asserting the division into thirty-three charges would be used to deny prompt trial, it would appear to be necessary for the defendant, the petitioner here, to make his demand for prompt trial.

This he did.

The Reporter's Transcript of Evidence and Proceedings in the Pike Circuit Court shows that:

> "The defendant moves that the 33 cases against him Numbered 104 to 136 consecutively and serially, be tried together at one time before the same jury" (TR, page 75).

The Court action is contained in the one word, "overruled" (TR, page 76).

The defendant took an exception in part for this reason:

> "(2) this division denies this defendant the speedy trial guaranteed him by the Constitution of the United States of America and the Constitution of the Commonwealth of Kentucky; (3) the refusal to try all cases at once constitutes an aggravation of the charge of double jeopardy heretofore made by motion, in that it multiplies the jeopardy many times over" (TR, page 76).

After further discussion the Court repeated its statement:

> "The motion is overruled" (TR, page 76).

The Oral Motion.

When the Commonwealth rested, the defendant made an oral motion for judgment of acquittal saying in part:

> "(2) the defendant moves on the ground that he has been previously tried and acquitted of the acts charged in the indictment on trial; (3) he moves on the ground that the splitting of the offense charged against this defendant into thirty-three separate indictments denies to him the speedy trial guaranteed him by the constitution of the United States of America and the constitution of the Commonwealth of Kentucky" (TR, page 148).

The action of the Court on this motion is given:

> "Thereupon, the Court having considered said motion, overruled the same" (TR, page 149).

Action of the Appellate Court on Constitutional Questions.

The Court of Appeals of Kentucky accepted the challenge to consider the constitutional rights of this petitioner. The opinion sought to be reviewed states in part:

> "Appellant's last complaint is that he was denied a speedy trial, and thus there was a violation of the right in this respect guaranteed him by the Sixth Amendment to the Constitution of the United States and Section 11 of the Constitution of Kentucky" (Appendix A, p. 22).

Then, the Appellate Court met the challenge by ruling decisively:

> "The speedy trial provision of the Sixth Amendment to the Constitution of the United States does not apply in state prosecutions" (Appendix A, p. 18).

On the other constitutional question, the Appellate Court took up the gage with this statement:

> "Appellant's final contention is that he has been put in double jeopardy by his conviction of the offense in this case. He, in effect, argues that his acquittal under the embezzlement indictment is a bar to this action" (Appendix A, p. 18).

The ruling of the Court is actually contained in the one sentence. Its discussion, and quotations from authorities, appear to run contrary to that sentence, but the ruling is plain:

> "It is readily apparent different elements make up each crime" (Appendix A, p. 23).

The Petition for Rehearing.

The Petition for Rehearing urged petitioner's constitutional defenses and called attention to the interpretation of the Sixth Amendment in Pointer v. Texas, 380 U. S. 400, 13 L. Ed 2d 923, 85 S. Ct. 1065.

The Petition for Rehearing was overruled without an opinion and mandate issued on October 1, 1965 (TR, page 249).

ARGUMENT.

The Right to Demand Speedy Trial.

Only a part of the petitioner's efforts to obtain trial are recited in the Statement of the Case. So much as became public record is offered in the Transcript. Even so it is clear that years of effort have brought him only to the point, where cases pending against him with possible penalties amounting to three centuries of time are ready to be invoked if and when it is the will of the prosecution.

This is a mass deployment of governmental power. It is a saturation attack, which can override the defenses of any ordinary citizen without regard to merit.

By the ruling of the Court of Appeals of Kentucky the state guaranty of prompt trial avails nothing.

By the ruling of the Court of Appeals of Kentucky the Sixth Amendment to the United States Constitution gives no guarantee of trial in the criminal courts of that state.

The petitioner and all who may be charged with crime in the Commonwealth of Kentucky are without hope save in this Court.

It is almost three years since Gideon v. Wainwright, 372 U. S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792, declared the standards of the Sixth Amendment concerning the right to counsel were binding on the State Courts.

It is less than one year since Pointer v. Texas, *supra,* and Douglas v. Alabama, 380 U. S. 415, 13 L. Ed. 2d 934, 85 S. Ct. 1074, clearly applied the confrontation requirements of Amendment Six.

In the months intervening the advance continues. Griffin v. California, 14 L. Ed. 2d 106, ruled the self-incrimination clause of the Fifth Amendment barred the state from allowing comment on failure of an accused to testify.

Estes v. Texas, 14 L. Ed. 2d 543, 560, ruled that broadcasting by television a trial of great public notoriety denied the defendant due process. Here, in the first of the separate opinions, the current recognition of the Sixth Amendment as a standard for constitutional rights in state trials is set forth and the breadth and importance of the doctrine is suggested in these words:

> "But it also has been agreed that neither the Sixth nor the Fourteenth Amendment is to be read formalistically, for the clear intent of the amendments is that these specific rights be enjoyed as a constitutional trial."

Now we do not offer a prior decision that the speedy trial of the Sixth Amendment is bound upon the states by the Fourteenth Amendment. In the light, however, cast upon the Sixth Amendment by late decisions how can such a conspicuous need as the right to demand trial be overlooked?

Petitioner's Plea of Former Jeopardy.

The Kentucky Court of Last Resort considered petitioner's reliance on the doctrine of former jeopardy and denied relief.

The opinion below stated that petitioner had been tried on the embezzlement charge. It quoted the former Commonwealth's Attorney to the effect that the thirty-two indictments covered the same sum of money alleged in the original indictment to have been embezzled.

The present state of the law on former jeopardy in Kentucky is declared by the opinion below in two sentences:

> "Both falsifying a claim against a political subdivision and embezzlement are stautory offenses. It is readily apparent different elements make up each crime."

In the light of the Court's statement in the same opinion that the money involved in the embezzlement indictment and the money involved in the series of indictments for false claims was the same money the actual holding is, that, notwithstanding the identity of the essential criminal act charged, the addition of a different element, and a different name, permits another trial and another penalty.

That this is a change in the law and a wide departure from the traditions of the former jeopardy rule in Kentucky, can be seen by comparing it with the review of decisions, on this point petitioner's application for rehearing below, which is attached to page 246 of the Transcript herein.

It is further of interest that application of this latest rule to former decisions upholding pleas of former jeopardy in Kentucky would require that these old decisions be now reversed and the plea in every one of them be denied.

The effect that the new prevailing rule could have on past adjudications is small. Most of the citizens whose pleas would be affected have travelled beyond the jurisdiction of the Courts of the Commonwealth.

It is the prospective view which is truly alarming. Taking for instance homicide, an offense not heretofore unknown in Kentucky, the ambiguous prosecutor can now warm up with a conviction under the statute which condemns assault with a deadly weapon. Death of the victim is not an element. He prosecutes again on a charge of involuntary manslaughter. Death is an element here, but malice aforethought is not.

Having passed this state with either an acquittal or a conviction—the prosecutor need pay no attention to this feature—he next indicts for willful murder. This offense has the element of death but it contains the different element of malice aforethought.

If it be urged that this is an extreme view and contrary to prior rulings of the Kentucky courts, we could only respond that the ruling sought to be reviewed is extreme enough to abrogate the protection of the double jeopardy doctrine in Kentucky and is likewise contrary to long established law there.

We beg to present that the decision sought to be reviewed destroys, in every practicable sense, the Constitutional right to be tried only once for a criminal act

and to demand a speedy trial under the Constitution of the Commonwealth of Kentucky. It abrogates those rights as to citizens of the United States within Kentucky so far as that court can do so.

Respectfully submitted,

JEAN L. AUXIER,
Pikeville, Kentucky,
Attorney for Petitioner.

CERTIFICATE OF SERVICE.

It is hereby certified that the foregoing Petition has been served upon the opposing counsel by mailing a copy thereof to the Honorable Thomas B. Ratliff, Commonwealth's Attorney, 35th Judicial District of Kentucky, Pikeville, Kentucky; to the Honorable Robert F. Matthews, Attorney General, Frankfort, Kentucky and to the Honorable James B. Stephenson, trial judge, Pikeville, Kentucky.

Attorney for Petitioner.